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No. _____

In the Supreme Court of the United States

BRYAN E. CULWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GARY A. UDASHEN
Counsel of Record

SORRELS & UDASHEN
2301 CEDAR SPRINGS ROAD
SUITE 400
DALLAS, TX 75201
(214) 468-8100
(214) 468-8104 FAX

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS FOR REVIEW

I. Does this Court's opinion in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) apply to the Federal Sentencing Guidelines?

II. Is a two year delay between the probation officer obtaining knowledge of an alleged supervised release violation and the petitioning of the court for action a violation of due process?

III. What are the legal standards to determine if a sentence is plainly unreasonable?

PARTIES TO PROCEEDINGS

Bryan E. Culwell - Petitioner
represented by
Gary A. Udashen
Sorrels & Udashen
2301 Cedar Springs Road
Suite 400
Dallas, Texas 75201
214-468-8100

The United States of America - Respondent
represented by
James Turner, Assistant United States Attorney
910 Travis, Suite 1500
Houston, Texas 77002
713-567-9000

and

Solicitor General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue
Room 5614 N.W.
Washington, D.C. 20530-0001
202-514-2000

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Petitioner, BRYAN E. CULWELL, hereby petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit (entered July 12, 2004) affirming the revocation of Petitioner's supervised release following his conviction for Bank Fraud.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated July 12, 2004 is *United States v. Bryan E. Culwell*, No. 03-21182. The opinion was unpublished. A motion for rehearing was filed and denied on August 13, 2004.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, U. S. Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, U. S. Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Mr. Culwell was charged with bank fraud in violation of 18 U.S.C. §1344. Jurisdiction in the District Court was pursuant to 18 U.S.C. §3231. On May 30, 1995, Mr. Culwell waived indictment and plead guilty to four counts of the information. On October 2, 1995, the Court sentenced Mr. Culwell to serve concurrent 42 month terms of imprisonment followed by concurrent 5 year terms of supervised release. No appeal from this judgment was taken.

The guideline calculations under the United States Sentencing Guidelines that ultimately led to the 42 month sentence were as follows:

- Base offense level under §2F1.1(a) 6
- Loss Amount of $3,176,649.20 §2F1.1(b)(N)+13
- More than one victim §2F1.1(2) +2
- Use of a special skill +2

- Acceptance of responsibility -3

Total Offense Level: 20

With a criminal history category of 3, the guideline range was 41 to 51 months. The District Court's sentence was within the range at 42 months.

At the sentencing hearing, the court imposed a condition of supervised release as follows:

> During your supervised release, you will open no checking, securities, credit card, credit account, issue no commercial paper, conduct no transaction for more than $200 in cash without the written approval of the probation officer in advance.

(2 R, 32-33; 1 R, 133).

Mr. Culwell served his 42 month prison sentence and was released to serve his supervised release.

On September 9, 2003, a "Report on Offender Under Supervision" was filed by the United States Probation Office alleging that Mr. Culwell had violated a condition of his supervised release - he had failed to pay restitution. (1 R, 161). The probation officer recommended that the court take no action and that it allow Mr. Culwell's term of supervised release to terminate on October 18, 2003. (*Id.*) The district court concurred with the recommended action. (1 R, 160).

On October 6,. 2003, the probation office filed a "Petition for Warrant or Summons for Offender Under Supervision" that alleged that Mr. Culwell had committed twelve violations of his conditions of supervised release: it was alleged that

between October 6, 2001 and November 21, 2001, Mr. Culwell committed the offense theft by deception. This allegation stems from the charges contained in an indictment filed in the state district court on September 18, 2003. (1 R, 167). The probation officer followed this allegation with ten allegations that Mr. Culwell committed the offense of operating deceptive business practices. (1 R, 165-166). Finally, the probation officer asserted that Mr. Culwell violated a special condition of his supervision by conducting commercial transactions and check cashing transactions totaling more than $20,000, on the following dates: October 16, 2001; October 17, 2001; October 19, 2001; November 12, 2001; October 17, 2001; November 19, 2001; and December 12, 2001. (1 R, 165). The probation office recommended that the district court revoke Mr. Culwell's term of supervised release. (*Id.*)

Mr. Culwell's revocation hearing began on October 20, 2003 where he conceded that he had written and cashed checks in excess of $200. (3 R, 4). Mr. Culwell explained that he wrote many checks in the course of conducting his business. Both Mr. Culwell and his attorney stated that the probation officer was well aware of his check cashing activity during his term of supervised release. (3 R, 4, 5). Mr. Culwell and counsel conceded that he cashed checks payable to himself far in excess of the limit imposed by the court. (3 R, 5).

In response to counsel's assertion that Mr. Culwell did not fully understand the condition imposed in 1995, the court noted a 1998 instrument signed by Mr. Culwell that set out a precise statement of the condition, "no securities, commercial paper, nor check-cashing transactions over $200." (3 R, 6).

After a lengthy discussion touching on (1) the disposition of the pending state charges, (2) whether action on the petition to revoke supervision could be deferred until after the state charges were disposed of, and (3) on Culwell's activities since his release from federal custody in 1998 (3 R, 7-13), Mr. Culwell's counsel suggested that if the court were to revoke his supervision solely on a violation of the special conditions of supervised release, he would be subject to an imprisonment range of 8 to 14 months. (3 R, 13). However, the District Court continued the hearing to allow Mr. Culwell and counsel time to review the transcript of the sentencing proceedings. (3 R, 22).

When the hearing resumed on November 10, 2003, the District Court focused on a $1,000 check payable to cash and signed by Mr. Culwell. (4 R, 16; 1 R, 165). The court found that Mr. Culwell had violated the special conditions of his supervised release by conducting transactions for more than $200 without securing approval from the probation officer. (4 R, 25, 26). After revoking the term of supervised release, the court ordered Mr. Culwell to serve concurrent 36 month terms of imprisonment on counts 1 and 2, and concurrent 36 month terms of imprisonment on counts 3 and 4. The court ordered that the two concurrent terms of imprisonment be served consecutively for a total term of imprisonment of 72 months. The court justified it's departing from the guideline recommendations by stating they were "wholly inadequate to address [Culwell's] recalcitrance and persistence" in perpetrating fraudulent transactions. (4 R, 25). No objections were lodged at the time of this pronouncement and the court ordered Mr. Culwell taken into custody at the close of the hearing. (4 R, 27).

Mr. Culwell gave notice of appeal to the Court of Appeals for the Fifth Circuit. In March of 2004, the appellate brief

was filed raising the following two issues:

> I. The probation officer's delay of nearly two years in petitioning the court to revoke Mr. Culwell's supervised release, despite contemporaneous knowledge of the conduct that formed the basis for revocation, was fundamentally unfair and denied Mr. Culwell due process.
>
> II. The district court's sentence of seventy-two months imprisonment for a technical violation of Mr. Culwell's special conditions of supervised release was plainly unreasonable.

On July 12, 2004, the Court of Appeals issued its per curiam opinion affirming the District Court's judgment.

Thereafter, on July 31, 2004, Mr. Culwell filed a Petition for Rehearing. In this rehearing petition, Mr. Culwell argued the sentence imposed violated his constitutional rights under *Blakely v. Washington*, 542 U.S. ____, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). On August 13, 2004, the Court of Appeals denied this Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

Question I

> Does this Court's opinion in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) apply to the Federal Sentencing Guidelines?

On June 24, 2004, the United States Supreme Court decided *Blakely v. Washington*, 542 U.S. ____, 124 S.Ct. 2531 (2004). In *Blakely*, the Supreme Court explicitly stated:

> . . . Our precedents make clear, however, that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring, supra, at 602, 153 L.Ed.2d 556, 122 S.Ct. 2428 ("'**the maximum he would receive if punished according to the facts reflected in the jury verdict alone**'" (quoting Apprendi, supra, at 483, 147 L.Ed.2d 435, 120 S.Ct. 2348)); Harris v. United States, 536 U.S. 545, 563, 153 L.Ed.2d 524, 122 S.Ct. 2406 (2002) (plurality opinion) (same); cf. Apprendi, supra, at 488, 147 L.Ed.2d 435, 120 S.Ct. 2348 (facts admitted by the defendant). **In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings**. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, supra, §87, at 55, and the judge exceeds his proper authority.

Based on the importance of the question raised by *Blakely*, i.e., its application to the Federal Sentencing Guidelines, the Supreme Court granted certiorari and heard expedited arguments in *United States v. Booker*, No. 04-104 and *United States v. Fanfan*, No. 04-105. In anticipation that the Court will conclude that *Blakely* and it's reasoning applies to the Federal Sentencing Guidelines, Mr. Culwell submits this question in his Petition for Writ of Certiorari. Clearly, the question raised here is an important question of federal law that has not been, but should be, settled by the Supreme Court. *See*, Supreme Court Rule 10(c). Additionally, there are conflicts among the circuit courts of appeals concerning

this question. Compare *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004) and *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004).

Under *Blakely*, the maximum sentence that could be imposed on Mr. Culwell was, in reality, no more than 51 months. In fact, a correct application of *Blakely* would result in a sentence of less than 51 months based on the elimination of various guideline enhancements. Nevertheless, under *Blakely*, the imposition of the 72 month sentence upon revocation of Mr. Culwell's supervised release is violative of his rights to a jury trial, right to proof beyond a reasonable doubt, and right to due process under the U. S. Const., amends. V and VI.

Since the maximum sentence to which Mr. Culwell was legally exposed was 51 months, the remaining time to which he could legally be sentenced on the revocation of his supervised release was 9 months. By sentencing him to 72 months, the District Court imposed a total sentence on Mr. Culwell of 113 months. This is more than twice the permissible sentence under the constitutional provisions discussed in *Blakely*.

It is axiomatic that a defendant cannot be required to serve a sentence of imprisonment greater than that allowed by law. The sentencing procedure used in this case violated Mr. Culwell's constitutional rights because the District Court inflicted "punishment that the jury's verdict alone does not allow." *Blakely*, 124 S.Ct. 2531, 2537 (2004). The sentence imposed on Mr. Culwell violates this basic principle. As made clear in *Blakely*, this is a basic constitutional violation that must not be allowed to stand.

A sentence imposed as the result of factual findings in a revocation hearing necessarily fails to comport with *Blakely* when that sentence represents an increase in the sentence that a defendant was originally subject to. A sentencing court's powers in revocation proceedings flow from its powers with regard to the original conviction. *Johnson v. United States*, 529 U.S. 694, 701 (2000) ("[w]e therefore attribute postrevocation penalties to the original conviction."); *United States v. Perez-Macias*, 335 F.3d 421, 427 (5th Cir. 2003) (a defendant who violates a condition of probation is subject to the punishment available at the original sentencing). Thus, a court lacks the power to increase the maximum sentence a defendant was originally subject to based on a factual finding that the defendant has violated his probation or supervised release.

If Mr. Culwell's supervised release is to be revoked, this requires a finding of fact that he violated the conditions of his release. This finding of fact would not be made by a jury, would not be based on an indictment, would not be based on a finding of guilt beyond a reasonable doubt, and would be in excess of the punishment authorized by the verdict and indictment in this case. This is the precise scenario prohibited by *Blakely*.

In *Jones v. United States*, 526 U.S. 227, 243 n. 6 (1999), the court stated that, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Just as *Blakely* challenged the notion of sentencing a defendant based on proof by a mere preponderance of the evidence, so should the court prohibit sentencing Mr. Culwell to 72 months additional prison time

by proof less than beyond a reasonable doubt.[1]

Moreover, the imposition of additional prison time as a result of the revocation of a supervised release is the functional equivalent of the imposition of the original sentence. Both are sentences designed to punish the defendant for the violation of the law he is charged with and therefore the same constitutional rights apply to both sentences. It is violative of the constitutional rights discussed in *Blakely* to allow the imposition of a prison sentence based on a supervised release violation without a finding by a jury beyond a reasonable doubt or an admission of a defendant. Congress cannot simply set out a form of imprisonment denominated as supervised release that is free from the restraint of the Fifth and Sixth Amendments of the United States Constitution.

Morissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) applies procedural due process rights in revocation hearings. Although revocation hearings have been characterized as administrative hearings, *Blakely* makes clear that exalting form over substance is inappropriate. The potential result of a revocation hearing is the same as any other criminal proceeding, i.e., confinement in prison. In Justice O'Connor's dissenting opinion in *Blakely*, she noted that the guidelines promulgation by an administrative agency was irrelevant to the question of the application of the Sixth Amendment to the guideline. Justice O'Connor stated that the

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[1] In *Ring v. Arizona*, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the court stated, "If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the state labels it - must be found by a jury beyond a reasonable doubt."

guidelines "have the force of law." 124 S.Ct. at 2549. Likewise, a revocation hearing, although characterized as an administrative hearing, has the force of law and should be treated the same as any other criminal proceeding.

In *Ameline*, the Ninth Circuit, *sua sponte*, found *Blakely* applicable to the Federal Sentencing Guidelines and invalidated the sentence imposed under the Sixth Amendment. In so finding, the Court discussed 18 U.S.C.§ 3742(e) regarding appellate deference to fact findings at sentencing hearings and stated:

> "The assumption behind this provision (and Rule 32), that the district court will make the requisite findings of fact, is unconstitutional under *Blakely* in cases absent a jury waiver."

Rule 32.1, F. R. Crim. Proc. applies to a hearing revoking supervised release. As in Rule 32, regarding sentencing hearings, Rule 32.1 sets out the responsibility of the Court and refers to 18 U.S.C. §3583. Appellant submits that just as the procedure for imposition of a sentence under Rule 32 is unconstitutional under *Blakely*, the same is true of the imposition of a prison sentence upon revocation of supervised release. This is particularly true since the supervised release is considered as a separate sentence from the other sentence imposed at the original sentencing hearing. In a supervised release revocation, the defendant is accused of new, distinct violations and punished for them. Under *Blakely*, since punishment is being imposed for this new act, all of the normal Sixth and Fifth Amendment rights apply, *i.e.*, right to a jury trial, right to proof beyond a reasonable doubt and right to indictment. *See*, *Morissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (due process rights apply in revocation hearings); *United States v.*

Williams, 919 F.2d 266 (5th Cir. 1990) (supervised release is a separate punishment). U.S.S.G. Chapter 7, (finding that revocation of supervised release is primarily punishment for new conduct). *See*, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (right to jury applies to determination of any fact that increases maximum punishment and such fact must be proven beyond a reasonable doubt); *Baldwin v. New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) (right to jury extends to any case where authorized penalty exceeds six months).

Moreover, under the reasoning of *Blakely*, Chapter 7 of the federal sentencing guidelines, dealing with revocation of probation or supervised release, has the force of law in the same manner as the remainder of the guidelines. Although Chapter 7 is characterized as policy statements and has been determined to be non-binding,[2] the *Blakely* ruling requires a reconsideration of that conclusion.

The policy statements of Chapter 7 are based on law and follow similar procedures as other guideline provisions. For instance, 18 U.S.C. §3665(a) states, in relevant part,

> "If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may . . .
> (1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
> (2) revoke the sentence of probation and resentence the defendant under subchapter A."

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[2] *See*, *United States v. Schwegal*, 126 F.3d 551 (3d Cir. 1997); *United States v. Shaw*, 180 F.3d 920 (8th Cir. 1999).

Subchapter A is codified at 18 U.S.C. §§3551-3561. In relevant part, it provides that:

(a) . . . The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed . . .

(3) the kinds of sentences available;

(4) *the kinds of sentence and the sentencing range established for* –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . that are in effect on the date the defendant is sentenced; or

(B) *in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code . . .*

(b) . . . In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

This code provision gives the Chapter 7 policy statements the force of law because district courts are required to consider them in assessing a sentence following revocation of supervised release or probation. A district court is required to consider the Chapter 7 policy statements in determining a sentence after revocation and the Court's decision will be reviewed by the appellate court under an abuse of discretion standard. *United States v. Tadeo*, 222 F.3d 623 (9th Cir.

2000). While the case law indicates that the district court can sentence above or below the range set out in the policy statements, nevertheless the policy statements must be considered and followed unless the sentencing court can justify not doing so.

There is no significant difference between the binding nature of the Chapter 7 policy statements and the departure provisions in the remainder of the guidelines (Chapter 5K.2, U.S.S.G.). Both recognize the guideline range as a starting point and both require the sentencing court to justify departures from that guideline range. *See*, *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) (discussing standard of review on departures); *United States v. Tschebaum*, 306 F.3d 540 (8th Cir. 2002) (discussing standard of review on revocation proceedings).

In *Blakely*, the court considered the "statutory maximum" to be that established by the Washington state guideline. Any factual finding that increased the sentence from the base guideline level was required to be charged in an indictment, submitted to a jury (if a jury is not waived) and proven beyond a reasonable doubt. The same reasoning applies to the Chapter 7 revocation guidelines and the Fifth and Sixth Amendment protections likewise apply.

In *Blakely*, Justice Scalia stated that, ". . . the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." The Chapter 7 policy statements establish the maximum sentence that can be imposed upon a revocation without a finding of additional facts that would justify a departure. *Blakely* clearly applies to this scenario.

The following language from *United States v. Celestine*, 905 F.2d 59 (5th Cir. 1990) also supports Mr. Culwell's argument:

> "Celestine next argues that twenty months of incarceration effectively upgrades his misdemeanor to a felony. In that regard, Celestine contends that his sentence constitutes a violation of his fifth amendment right to indictment by grand jury for an infamous crime. Celestine's argument is predicated on the contention that the one year term of supervised release and the eight month term on the underlying conviction are part and parcel of the same sentence. As discussed above, however, Congress has authorized two separate punishments for the offense of which Celestine was convicted. Moreover, the fifth amendment protection which Celestine seeks attaches only to infamous crimes. Since the United States Supreme Court has held that an infamous crime is one punishable by imprisonment in a penitentiary, and since Congress has foreclosed imprisonment in the penitentiary for the offense conduct in the instant case, Celestine's contentions are without merit. *See Green v. United States*, 356 U.S. 165, 78 S.Ct. 632, 2 L.Ed.2d 672 (1958) and 18 U.S.C. §4083."

Mr. Culwell contends that since his supervised release prison term exceeded one year all of the rights attendant to a felony prosecution apply to him, including the right to a jury trial, Grand Jury indictment and a finding of guilt beyond a reasonable doubt.

Mr. Culwell recognizes that without an objection on this basis review on appeal is for plain error. *See*, *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1170, 123 L.Ed.2d 508

(1993); *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain and (3) that affects a substantial right. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *See also*, *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004) (finding *Blakely* error to be plain error). In this case, the error is plain under *Blakely* and it clearly affects a substantial right. A sentence that violates the *Blakely* principles that is more than four times the suggested range is clearly substantially egregious to affect the fairness, integrity and public reputation of the judicial proceeding.

Based on the foregoing, Mr. Culwell prays that his Petition be granted and his sentence be vacated.

Question II

> Is a two year delay between the probation officer obtaining knowledge of an alleged supervised release violation and the petitioning of the court for action a violation of due process?

As stated previously, the probation officer delayed for a period of two years the petitioning of the court for action after the discovery of alleged supervised release violations by Mr. Culwell. The issue raised here is whether that type of delay is a violation of due process.

This question is an important question of federal law that has not been, but should be, settled by the Supreme Court. See Supreme Court Rule 10(c). Moreover, there are

conflicting decisions among the courts of appeals on this question. See Supreme Court Rule 10(a).

In the case at bar, the Court of Appeals cited three cases in support of its conclusion that plain error was not shown by this delay. *United States v. Tyler*, 605 F.2d 851 (5th Cir. 1979) actually supported Mr. Culwell's argument. In *Tyler*, the probation officer delayed for a year the filing of a revocation petition alleging violations of probation. Before filing the petition, the probation officer made an unsuccessful attempt to revoke the defendant's probation for other conduct. Following this, after a delay of several more months, the probation officer filed the petition for revocation alleging for the first time the year old allegations. The Fifth Circuit found that this second revocation hearing violated the defendant's due process rights. In *United States v. Sanchez*, 225 F.3d 172, 177 (2d Cir. 2000), the Court cited *Tyler* with approval.

The second case relied on by the Fifth Circuit in the case at bar was *United States v. Tippens*, 39 F.3d 88, 90 (5th Cir. 1994). In *Tippens*, there was a thirty month delay between issuance and execution of a warrant for violation of a condition of supervised release. The defendant's argument in *Tippens* was that the execution of the warrant would have allowed him to serve federal and state sentences concurrently. The court rejected the argument that this is a violation of due process. However, the *Tippens* court noted that a delay in executing a violator's warrant may deny due process if the delay undermines the probationer's ability to contest the violation or proffer mitigating evidence. The court cited *United States v. Williams*, 558 F.2d 224 (5th Cir. 1977) which stated that the right to a speedy trial, which is one of the most basic rights preserved by the Constitution, cannot be completely divorced from the panoply of rights embraced by due process in revocation proceedings.

Lastly, the Fifth Circuit cited *United States v. Gonzales*, 250 F.3d 923, 930 (5th Cir. 2001) which concerned the question of imposing consecutive sentences upon revocation of supervised release and not questions of delay in pursuing the alleged violations.

Other courts of appeals have also addressed this issue. For instance, in *United States v. Hamilton*, 708 F.2d 1412, 1415 (9th Cir. 1983), the court reversed a revocation sentence based on the probation officer's three year delay in pursuing alleged violations before filing a revocation petition. This is a factual situation similar to the case at bar and the opinion in *Hamilton* is inconsistent with that of the Fifth Circuit here.

Under *Morissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) procedural due process rights apply in revocation hearings. The right to a speedy hearing is a component of these due process rights. See, *Tippens*, *supra*. However, as demonstrated by the cases cited above, and the manner in which the case at bar was treated, this right has been inconsistently applied. This petition should be granted in order to clarify when, how and under what circumstances this due process right to a speedy and prompt resolution of the question of a revocation of supervised release or probation is to be effected.

Although the Sixth Amendment speedy trial cases do not directly apply to revocation proceedings, they do provide guidance in this area. In *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) and *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) the Court considered what length of delay would be presumptively prejudicial. In *Doggett*, at 505 U.S. at 652, fn. 1, the Court noted that lower courts have generally found a one year delay to be presumptively prejudicial. In

determining at one point a delay in pursuing a revocation motion reaches a violation of due process, this presumption of prejudice from a lengthy delay cited in *Doggett* logically should apply to supervised release revocation proceedings.[3]

In the case at bar, the Fifth Circuit found that the delay in this case did not meet the plain error standard of *United States v. Olano*, 507 U.S. 725, 731-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). However, the court gave no consideration to the fact that a two year delay legitimately raises a presumption of prejudice. Under this presumption, the delay in this case is prejudicial and therefore the plain error standard is met.

The questions raised herein recur with frequency in the lower courts. The vague and inconclusive standards for determining when a due process violation is established by a delay in a revocation proceeding only serve to create confusion in the courts. For this reason, this Petition for Writ of Certiorari should be granted.

Question III

What are the legal standards to determine if a sentence is plainly unreasonable?

In *United States v. Gonzales*, 250 F.3d 923 (5th Cir. 2001) cited by the Court of Appeals in the case at bar, the Court stated the following:

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[3] The Seventh Circuit has explicitly adopted the *Barker* test as establishing the framework for determination of a violation of due process from a delay in a revocation hearing. *See*, *United States v. Scott*, 850 F.2d 316 (7th Cir. 1988).

"This court "will uphold a sentence unless it (1) was imposed in violation of law, (2) resulted from an incorrect application of the guidelines, (3) was outside the guideline range and is unreasonable, or (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable." *United States v. Pena*, 125 F.3d 285, 286 (5th Cir. 1997) (internal quotations omitted) (quoting *United States v. Teran*, 98 F.3d 831, 836 (5th Cir. 1996)); *see also United States Deavours*, 219 F.3d 400, 402 (5th Cir. 2000). Because there are no applicable guidelines for sentencing after revocation of supervised release, *see* U. S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A, cmt. 1 ("At this time, the Commission has chosen to promulgate policy statements only."), this court will uphold a sentence unless it is in violation of the law or plainly unreasonable. *See*, *United States v. Stiefel*, 207 F.3d 256, 259 (5th Cir. 2000); *Pena*, 125 F.3d at 287. In making this determination, the court reviews de novo the district court's interpretation of the sentencing statutes. *See United States v. Teran*, 98 F.3d 831, 835 (5th Cir. 1996); *United States v. Mathena*, 23 F.3d 87, 89 (5th Cir. 1994)."

The question that was presented to the Court of Appeals in challenging Mr. Culwell's sentence was whether it was plainly unreasonable. Mr. Culwell submits that this Petition should be granted in order that the Supreme Court can define what is meant by "plainly unreasonable" and what standards the courts of appeals should use in making this determination. This is a question that has not been, but should be, settled by the Supreme Court. See Supreme Court Rule 10(c).

In the case at bar, Mr. Culwell was sentenced to a total of 72 months in prison upon the revocation of his supervised release. This was a dramatically higher sentence than that recommended by Chapter 7 of the United States Sentencing Guidelines. Under these advisory policy statements, Mr. Culwell would have faced a sentence of 5 to 11 months.

In reviewing this sentence, the Fifth Circuit applied a plain error analysis and simply stated that Mr. Culwell failed to demonstrate plain error. No discussion of the reasons for this conclusion is contained in the opinion. This case demonstrates the arbitrariness of the review of whether a sentence is plainly unreasonable. In order to ensure fairness, uniformity and equity, there must be some standards for the appellate court to use in reviewing the sentence.

By way of analogy, Mr. Culwell would point the Court to the Eighth Amendment standard for determining cruel and unusual punishment. Under *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), sentences must be proportionate to the crime. The considerations in making this determination are the gravity of the offense and sentences imposed on others in the same and other jurisdictions. Mr. Culwell asserts that under *Morissey v. Brewer*, *supra*, the right to a punishment that is not disproportionate to the violation is a component of the due process rights that apply in revocation hearings.

The sentencing guideline recommendation of a sentence of 5 to 11 months for Mr. Culwell's violation raises a presumption that this 72 month sentence is disproportionate. In fact, in the vast majority of cases, sentencing courts will follow the Chapter 7 recommendation. A sentence this much above the range established in Chapter 7 is presumptively unreasonable and should be carefully reviewed on appeal,

rather than simply rubber-stamped as done by the Court of Appeals in the case at bar. Even cases that are sentenced outside the recommended range are extremely unlikely to reach the level of arbitrariness demonstrated in the case at bar. The Court of Appeals should review this sentence with some uniform standards such as in the Eighth Amendment area in order to avoid the tremendous sentencing disparity created by a standardless review.

Without the codification of standards for the Court of Appeals to follow in reviewing the reasonableness of a sentence, the outcome of these appeals is left to the whim of individual judges. Such a situation is a clear violation of due process under the U. S. Constitution, Fifth Amendment. There must be some uniform basis for appellate review in this situation. Based on the lack of clarity on this question, this Petition should be granted.

CONCLUSION

Based on the foregoing, Mr. Culwell prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

GARY A. UDASHEN
Counsel of Record

SORRELS & UDASHEN
2301 Cedar Springs Road
Suite 400
Dallas, Texas 75201
214-468-8100
214-468-8104 fax

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-21182

[Filed August 13, 2004]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRYAN E. CULWELL,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-95-CR-31-ALL

Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-21182

[Filed July 12, 2004]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRYAN E. CULWELL,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-95-CR-31-ALL

Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

OPINION

PER CURIAM:*

Bryan E. Culwell appeals the district court's sentence imposed following revocation of his supervised release. Culwell pleaded guilty in 1995 to four counts of bank fraud, in violation of 18 U.S.C. § 1344, and he was sentenced to concurrent 42-month terms of imprisonment, to be followed by concurrent five-year terms of supervised release. The district court found that Culwell violated the condition of supervised release prohibiting him from engaging in commercial paper/check cashing transactions that exceeded $200, and he was sentenced to consecutive terms of imprisonment totaling 72 months.

For the first time on appeal, Culwell argues that the two year delay between his supervised release violations and the probation officer's filing of the petition to revoke violated Culwell's rights to due process. Culwell further argues, also for the first time, that his total 72-month sentence was plainly unreasonable. Both parties agree that Culwell's arguments are subject to plain error review.

Under the plain error standard, this court may correct a forfeited error only when the appellant establishes 1) there is an error, 2) that is clear or obvious, and 3) that affects his substantial rights. *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994)(en banc)(citing *United States v. Olano*, 507 U.S. 725, 731-37, 113 S. Ct. 1770, 123 L. Ed.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

2d 508 (1993)). We have reviewed the record and the briefs of the parties and hold that Culwell fails to demonstrate plain error with respect to his arguments. *See United States v. Tyler*, 605 F.2d 851, 853 (5th Cir. 1979); *United States v. Tippens*, 39 F.3d 88, 90 (5th Cir. 1994); *United States v. Gonzalez*, 250 F.3d 923, 930 (5th Cir. 2001).

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

No. 4:95CR00031-001

[Filed November 24, 2003]

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
v.	)
	)
BRYAN E. CULWELL,	)
Defendant.	)
	)

JUDGMENT IN A CRIMINAL CASE

The Defendant was found in violation of condition(s) 12 after denial of guilt.

Violation Number	Nature of Violation
12	Conducting commercial paper transactions and check-cashing transactions over $200, without permission of the U.S. Probation Officer

Date Violation Occurred
11/10/2001

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States Attorney fo any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 463-89-0358
Defendant's Date of Birth: 12/27/1971
Defendant's USM No.: 66552-079
Defendant's Residence Address: 15702 Connors Avenue
Spring, Texas 77379

Defendant's Mailing Address: 15702 Connors Avenue
Spring, Texas 77379

Date of Imposition of Judgment: November 10, 2003

/s/_____
Signature of Judicial Officer

LYNN H. HUGHES
UNITED STATES DISTRICT JUDGE

Date: November 21, 2003

IMPRISONMENT

The Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 72 months.

This term consists of THIRTY-SIX (36) MONTHS as to Counts 1 and 2 to run concurrently to each other and THIRTY-SIX (36) months as to Counts 3 and 4 to run concurrently to each other but consecutively to Counts 1 and 2 for a total term of SEVENTY-TWO (72) MONTHS.

The Defendant is remanded to the custody of the United States Marshal.

APPENDIX D

SUPERVISED RELEASE REVOCATION GUIDELINES CASE JUDGE'S SENTENCING OPTIONS WORKSHEET

(Based on U.S. Sentencing Commission Guidelines Manual, Chapter 7 and Title 18 U.S. Code)

NOTE: This worksheet contains the provisions of the Crime Act of 1994 as they apply to offenses committed on or after September 13, 1994.

Defendant: Bryan Edgar Culwell

Docket No. 4:95CR00031-001

District/Office: Southern District of Texas/Houston Division

Original Sentence: Forty-two months imprisonment; five years supervised release. Special conditions: financial disclosure, not to engage in securities transactions, commercial paper transactions nor conduct check cashing transactions over $200.00 without the permission of the probation officer.

Original Sentence Date: 10/02/95

I. VIOLATIONS(S)

A. The Court finds the following conditions of Supervised Release have been violated:

	Grade of Violation
1. New Law violation - Theft by Deception (State Jail Felony)	B
2. New Law Violation - Operating Deceptive Business Practices, 10 separate charges (Class A Misdemeanors)	C
3. Special Condition - Conduct Commercial Paper Transactions and Check Cashing Transactions without the permission of the probation officer	C

B. Most Serious Grade of Violation: **B**. [See §7B1.1 (a) and (b)]

C. Court "shall" revoke supervised release upon finding of Grade A or B violation(s). [See §7B1.3(a)(1)]

D. Court "may" revoke or extend term and/or modify conditions of supervision upon finding of Grade C violation(s). [See §7B1.3(a)(2)]

E. The Court "shall" revoke supervised release and require the defendant to serve a term of imprisonment

not to exceed the maximum term authorized under 18:3583(e)(3) if the defendant:

1) is in unlawful possession of a controlled substance [18:3583(g)]

2) is in possession of a firearm, in violation of federal law or a condition of supervision [18:3583(g)]

3) refuses to comply with drug testing imposed as a condition of supervised release [18:3583(d)]

NOTE: U.S. v. COURTNEY, 979 F.2D 45, 49-50, (5th Cir. 1992) holds use of a controlled substance establishes possession for purposes of revocation.

However, the court shall consider if the availability of drug abuse treatment, or an individual's current or past participation in such programs, warrants an exception from 18.3583(g), when considering action against a defendant who fails a drug test. [18:3583(d)]

II. IMPRISONMENT - If the Court elects to Revoke Supervised Release.

A. Maximum term of imprisonment allowable: **3 years on counts 1-4.** [Classification of felony/misdemeanor offense from Presentence Report; see 18 U.S.C. 3583(e)(3)]. Note that any subsequent revocations have additional restrictions on the statutory maximum imprisonment. [See 18:3583(h)].

B. Criminal History Category from Presentence Report: **III**

C. Chapter 7 Guideline of Imprisonment: **8 to 14 months on counts 1-4** (See §7B1.4)

Now codified by the Crime Act of 1994 at 18:3553(a)(4)(B), the Court shall consider the Chapter 7 guideline range in imposing a sentence at revocation.

D. SENTENCING OPTIONS

NO OPTIONS TO IMPRISONMENT ARE AVAILABLE FOR GRADE A VIOLATIONS.

IN THE CASE OF GRADE B AND C VIOLATIONS:

If the minimum imprisonment range is 1 to 6 months, minimum term of imprisonment may be satisfied by:

1) imprisonment
2) imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention for any portion of the minimum term. [See § 7B1.3(c)(1)]

If the minimum imprisonment range is 7 to 10 months, minimum term of imprisonment may be satisfied:

1) imprisonment
2) imprisonment substituting community

confinement or home detention as condition of supervised release provided that at least one-half of the minimum term is satisfied by imprisonment. [See § 7B1.3(c)(2)]

If the minimum imprisonment range is more than ten months, no option to imprisonment is available. [See § 7B1.4]

E. Official Detention Adjustment: 0 months 0 days.

Where the Court revokes supervised release and imposes a term of imprisonment, it shall increase the term of imprisonment by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. 3585(b), other than time in official detention resulting from the federal violation warrant or proceeding. [See § 7B1.3(e)]

III.SUPERVISED RELEASE

When a term of supervised release is revoked and the defendant is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term, the Court may order the defendant be placed on a term of supervised release after imprisonment. The length of such term shall not exceed the statutory maximum authorized, less any cumulative time in imprisonment imposed as a result of revocation(s) of supervised release. [See 18:3583(h)].

IV. UNPAID/UNSERVED CONDITIONS:

Any fine, restitution, community confinement, home detention previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at that time of revocation shall be ordered to be paid or served in addition to the sanction determined under the Chapter 7 term of imprisonment. [See § 7B1.3(d)]

Restitution: $5,823.66

Fine: $20,000.00

V. DEPARTURE(S)

Aggravating/Mitigating Factors-Specific Offender Characteristics (List those factors that may warrant a departure sentence outside the applicable range of imprisonment). [See 7B1.4 App. Notes 2, 3 and 4]

VI. NOTES/COMMENTS: